first accused was produced and put in evidence. Although we were informed that the first accused had never been convicted, the photograph was bound to give a bad impression. It was mounted on a card with several other photos of Indians. It bore a police number and was a combined profile and full face photo. It was obviously a police record and putting it in evidence was tantamount to saying that this man was a bad character. In *Lai Ah Kam v. R.*[1] the Colony Court of Criminal Appeal, following *R. v. Dwyer*[2] quashed a conviction because such a photograph as the present was shown to the Jury. We see no objection to the utilisation of such a photo by the police before arrest to assist them in ascertaining whom they should arrest, but the photograph should not be tendered in evidence by the prosecution. Of course, the police, in showing photographs, must do nothing to suggest that a particular photograph may be that of the wanted man.

The production of the photograph in the present case would be apt to prejudice a jury and to embarrass a Judge, and where evidence pro and con of robbery is fairly evenly balanced, may easily have the effect of tipping the scale.

There probably was some scuffle over gaming in which the complainant lost his money, but it is very questionable whether the complainant ever regarded himself as having been robbed. He was forced to make a complaint to the police and has been dragged reluctantly into the prosecution.

Under all the circumstances we consider that it was unsafe to convict, and we quash the conviction.

Conviction Quashed.

JOHORE REPORT.

PUBLIC PROSECUTOR vs. SIM MOH EE.

[App. Crim. Juris. (Laville, Ag. J.) October 25, 1941]

Laws of Johore, Enactment 102 Sections 9 (1) and 64 — Possession of a still — Factors to be considered in assessing quantum of fine.

In this case the Public Prosecutor appealed against the sentence of a fine of $25.00 or in default 3 weeks r.i. passed on the respondent for the offence of knowingly being in possession of a complete still, an offence under S. 9 of Enactment 102. On the accused's plea of guilty the learned Magistrate did not record any evidence. It was submitted on behalf of the State (a) that there was evidence which should have been called for by the Magistrate that the still was being used for manufacturing illicit samsu on a small commercial scale; (b) that in view of the maximum sentence set out by Section 64 for this offence the infliction of a fine of 1/40 of the maximum was inadequate; and (c) that a deterrent sentence was necessary to safeguard the revenue.

Held, (a) that in assessing the fine for an offence under Section 9 for knowingly being in possession of a still, it would be improper to presume that an offence under Section 8 for distilling liquor without a licence has also been committed and to allow such presumption to influence the weight of the sentence to be inflicted.

(b) that Section 64 is an omnibus section and the maximum penalty laid down should not be taken as a criterion by which to measure all offences punishable thereunder.

(c) that the Court in assessing sentence should not be influenced by the financial position of Government or any of its departments.

Cases referred to:—

(1) *Rex v. Teo Woo Tin* 1 M.L.J. 124.

(2) *Lee Yu Fah vs. Public Prosecutor* 6 M.L.J. 179.

T. D. Hughes, Public Prosecutor, Johore for Appellant.

Respondent in person.

Laville, J.—The State appeals against the sentence of a fine of $25 or in default 3 weeks r.i. passed upon the respondent Sim Moh Ee by the Kota Tinggi Magistrate's Court on 4.9.41 in K. T. Arrest Case No. 273 of 1941.

In that case Sim Moh Ee was charged that he at or about 4.50 p.m. on 27.8.41 in a kongsi at R. E. Malaya Estate Kota Tinggi did knowingly keep or have in his possession custody or control one complete still for the purpose of distilling samsu without a licence, and that by so doing he committed an offence under section 9 (i) punishable under section 64 of Enactment 102 of the Laws of Johore. To this offence accused pleaded guilty and was sentenced to a fine of $25 or 3 weeks r.i. and the still with possession of which he was charged was confiscated.

I have something to say in regard to the charge: the offence under section 9 (i) is conscious possession of a still or other distilling or liquor manufacturing apparatus without having a licence under section 8 of the Enactment: the words "for distilling or manufacturing intoxicating liquor" define the nature of the still and other apparatus and are adjectival: this is plainly seen from their use in section 9 (ii). Mere

conscious possession of such articles without a licence under section 8 is an offence: the charge however by adding after the word "still" the phrase "for the purpose of distilling samsu without a licence," make it appear that the mere conscious possession of a still or such apparatus is not an offence unless such possession is for the purpose of distilling samsu without a licence: in other words that the essence of the offence charged is the purpose for which the still is kept and not the conscious possession thereof. In my opinion however the accused was not misled or prejudiced by this defence and it is curable under section 422 of the Criminal Procedure Code.

On the accused's plea of guilty no evidence was recorded by the Court as to the circumstances of the arrest of the accused or the seizure of the still nor is it apparent from the record whether the still was exhibited in Court or not or as to its condition or size. It has been held that it is the duty of a Magistrate when a plea of guilty has been recorded to take evidence as to the circumstances of the offence and the means of the accused to enable him to estimate the correct sentence which he should inflict. The Magistrate has failed to do this and from the record it is impossible to say on what grounds he based his sentence, nor does he make it any clearer in his grounds of judgment. A statement as to these circumstances were made by the learned Public Prosecutor in this Court and the still was produced in Court.

The State appeals on three grounds that the sentence is inadequate. The first is that it is clear on evidence that should have been called for by the Magistrate and is now stated in this Court that the still was being used for manufacturing illicit samsu on a small commercial scale: the nature of the evidence is the large size of the still and the loneliness of the place where it was discovered: even assuming the proper production of such evidence and the likelihood from the appearance of the still that it had been used to make samsu I am of opinion that such evidence or considerations should have no weight in assessing the punishment for the offence charged. That offence was conscious possession of a still while having no licence to distill intoxicating liquor: the actual distilling of such liquor without a licence is a separate offence punishable under sections 8 & 64 of Enactment 102: with this offence the accused was never charged nor convicted nor with any abetment thereof. The plea of the State therefore is that the Court for the purpose of assessing punishment for an offence under section 9 should presume that an offence under section 8 has been committed or abetted. In my view to make such a presumption is improper. It would have been easy for the Legislature, had it so intended, to lay it down that conscious possession of a still when having no licence under section 8 shall entail the presumption that it has been used by the possessor to commit an offence under section 8 or to abet such an offence till the contrary is proved: this would have made possession of a still without having a licence under section 8 conclusive evidence of an offence thereunder till disproved. But the Legislature it would appear has taken another view, to wit, that a still is so dangerous a temptation to break the provisions of section 8 that its possession should be made an offence. These two offences are different and separate and in my view it is wrong to presume the commission of an offence under section 8 because an offence under Section 9 has been proved or to allow such a presumption to influence the weight of the sentence to be inflicted under section 9. Plainly the main evil against which the law was enacted is that set out in section 8, and the offence created by section 9 is a subordinate one: the relationship between the two is analogous to that between the commission of burglary and the offence of being in possession of burglarious tools.

The second ground of appeal is that in view of the maximum sentence set out by section 64 for this offence the infliction of a fine of 1/40th of such maximum is inadequate. In considering the validity of this ground of appeal it must be remembered that section 64 is an omnibus penal section under which various offences under the enactment are punishable. The main offence against which it is aimed is covered by it, but so also are subsidiary offences. It is not I think reasonable to suggest that it was contemplated that all these offences were of equal gravity and deserved equal punishment, but merely that the biggest fine for the serious offences could not exceed $1,000. The possession of a still cannot be said to amount to an attempt to manufacture liquor or even to a complete preparation to do so: it is merely a temptation to do so which the law says must not be incurred. In my view it cannot be said to be a major offence under the enactment and the Court in applying the wide provisions of section 64 to such offence should not overlook its minor nature. I cannot therefore agree that the high maximum fine laid down by such a section as section 64 is any criterion for the correct assessment of a fine for a minor offence punishable thereunder.

In *Rex v. Teo Woo Tin*[1] Murison, C.J. laid down that the rule to follow in estimating punishment was that set out in Magna Carta c. 14 "liber homo non amercietur pro parvo delicto nisi secundum modum ipsius delicti et pro magno delicto secundum magnitudinem delicti." It is the gravity of the offence that is the fundamental test. Murison, C.J. went on to state that other points to be weighed in assessing the quantum of a fine were the profit arising from the offence: the value of the subject matter of the offence: the amount of injury done and the financial position of the offender: previous convictions or unusual prevalence of the offence if proved would also be considered. Applying these tests to the offence charged and admitted it cannot be said that any profit arises from the mere possession of a still or that its value is great: the injury done is a disobedience of a rule laid down by the State. No evidence was taken by the Magistrate as to the financial position of the accused but it was disclosed in this Court that he was a weeding coolie with an income of about $20 a month and no property: it is on record that he had no previous convictions. No evidence was led in this Court but the Public Prosecutor was understood to say that there have been complaints of the prevalence of illicit distilling of liquor which necessarily involve the keeping of stills.

Applying these approved tests to the offence charged and in view of the fact that the maximum fine for possession of burglarious implements on a first offence is $25 (Small Offences Enactment section 29 (iv)) I cannot hold that the fine inflicted in this case was inadequate. I agree with the opinion of Pedlow J. in *Lee Yu Fah v. The Public Prosecutor*[2] that a fine should seldom be so excessive as to ruin completely the person on whom it is imposed and make him an outcast in the country and a potential criminal. I have already mentioned the analogy between burglary and illicit distilling in that the mere possession of instruments for their commission is made an offence.

As to ground 3 of the appeal in view of the judgment in *Rex v. Teo Woo Tin* it appears that the Court in assessing punishment should not be influenced by the financial position of Government or any of its departments. The Court is only concerned with the individual offence and the individual wrongdoer and must assess the penalty according to the circumstances of the individual offence and its perpetrator. It would in my view be unfair to inflict on an individual offender a penalty incommensurate with his circumstances and with the offence in order that it might be a warning to possible future offenders. It is the business of the Legislature to safeguard the revenue of the Government by the promulgation of laws that will be effective to that end, and possibly the practice of illicit distilling would be more effectively checked by making the conscious possession of a still presumptive evidence that an offence under section 8 of the Enactment had been committed till the contrary is proved, rather than by making the mere conscious possession an offence, and so being forced into the plea that in assessing punishment for the latter offence the Court should presume the accused guilty of an offence with which he is not charged or convicted and punish him for that as well.

In para. 5 of the Petition of appeal the learned Public Prosecutor refers to a recent judgment in Criminal Appeal No. 1 of 1941 in which the Court increased a sentence of $30 or one month for an offence similar to this to one of a fine of $250 or 4 months. No written reasoned judgment appears to have been given in that case but the Public Prosecutor informed the Court that the oral reason given for the enhancement was to ensure that it would be improfitable for the offender to distill illicit liquor. I cannot obtain the ratio decidendi in that case but with great respect to the learned Judge who tried it it would seem that it was overlooked that the charge was not one of distilling illicit liquor but of possession of the means of doing so.

To sum up, the offence created by section 9 is that of mere possession: it is improper to assume for the purpose of enhancing the seriousness thereof and the punishment therefor that an offence under section 8 has also been committed: an offence under section 9 amounts merely to possession of implements with which an offence under section 8 can be committed and is a minor offence.

Section 64 is an omnibus section and the miximum penalty laid down therein should not be taken as a criterion by which to measure all offences punishable thereunder.

The points to be considered in determining the question of a fine are set out in *Rex v. Teo Woo Tin,* and applying the conclusions drawn in that appeal to the present case it cannot be said that a fine of approximately 1 month's income for a minor offence is inadequate.

I therefore dismiss the appeal and maintain the sentence of the lower Court.

Appeal dismissed.